



Re-imagining the Trust

Trusts in Civil Law

EDITED BY
LIONEL SMITH

CAMBRIDGE

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RE-IMAGINING THE TRUST

Trusts in Civil Law

Although the trust is generally seen as a creation of the common law tradition, modern civilian systems are increasingly interested in incorporating the trust institution. This collection of essays explores multiple civilian experiences with the trust. The creative reform of Quebec's trust institution in 1994 has attracted worldwide attention. In Louisiana, the 1964 Trust Code stands in an uneasy relationship with the general law of property. Israel has had a fascinating pluralist experience of multiple trusts. The People's Republic of China passed a Trust Law in 2001 and the development of the trust in this important economy is a matter of great interest and some controversy. France adopted a trust in 2007, and in Italy trusts can be created through the choice of foreign governing law, under the Hague Trusts Convention. The concluding chapter draws conclusions from all the essays, and sets out challenges for future research in the comparative law of trusts.

LIONEL SMITH is James McGill Professor of Law and Director of the Quebec Research Centre of Private and Comparative Law at the Faculty of Law, McGill University.

NOTES ON CONTRIBUTORS

François Barrière is Maître de conférences at Université Panthéon-Assas (Paris II), PRES Sorbonne Universités.

Madeleine Cantin Cumyn is Wainwright Professor Emeritus of Civil Law and Full Member of the Quebec Research Centre of Private and Comparative Law, Faculty of Law, McGill University.

Michele Graziadei is Full Professor of Private Law, Faculty of Law, University of Turin.

Lusina Ho is Harold Hsiao-Wo Lee Professor in Trust and Equity at the Faculty of Law, University of Hong Kong.

Adam Hofri-Winogradow is Assistant Professor, Faculty of Law, Hebrew University of Jerusalem.

Michael McAuley was the Clarence W. Edwards Associate Professor at the Paul M. Hebert Law Center of Louisiana State University from 2001 to 2006. He is admitted in Quebec and Bermuda, and practises law in Guernsey.

Lionel Smith is James McGill Professor of Law and Director of the Quebec Research Centre of Private and Comparative Law, Faculty of Law, McGill University.

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Introduction

Lionel Smith

Can the trust be a bridge between the common law and the civil law? Can that which is untranslatable be the path to a better understanding?¹ Can the ideas of confidence and entrustment find common but diverse expression in the different juridical languages of the modern world?

In 2008 the Quebec Research Centre of Private and Comparative Law launched an ambitious research project on trusts in civilian and mixed jurisdictions, aimed at exploring the ways in which the trust institution is implemented and understood in the context of a civilian law of property. The goals of this programme naturally include an improved understanding of the different ways in which trusts can be and have been incorporated in civil law; this requires the examination of fundamental categories of civilian juridical thought, including personality and patrimony, ownership and obligation. For those civilian systems that may be considering the implementation of a trust institution, these lessons from around the world will be invaluable. But the goals are deeper and wider. In the realm of trusts, common lawyers are often cast, or cast themselves, in the role of teachers.² Yet common lawyers who pay attention to the lessons of comparative law will find that

¹ F. Ost, *Le droit comme traduction* (Quebec: Les Presses de l'Université Laval, 2009), pp. 58–64.

² M. Lupoi, *Trusts: A Comparative Study*, trans. S. Dix (Cambridge University Press, 2000), pp. 329–31.

they have much to learn, not only about the civil law but about their own trust, its nature and its history.

The comparative study of trusts did not attract a great deal of attention during the twentieth century. The trust of the common law was frequently portrayed as characterized by a division of ownership that was said to be unintelligible to the civilian law of property. This may have suited very well those civilians who wished the trust to remain an alien. Common lawyers, for their part, tend to assume that the only trust worthy of the name is the common law trust that grew out of the interaction between the common law and the principles of Equity developed by the Court of Chancery. Recent common law scholarship has revived interest in the obligational foundations of the trust idea, and has demanded a new inquiry into its juridical nature. On this approach, the language of divided ownership is nothing but an imprecise metaphor for an idea better captured by the Indian Trusts Act 1882, the only statutory definition of the common law trust that is in force today:

A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another . . .³

³ Indian Trusts Act, 1882, Act No. 2 of 1882, s. 3. See also California Civil Code, § 2216, no longer in force: 'A voluntary trust is an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another.' This definition is less precise as it does not incorporate the fundamental principle of the common law trust, that the trust is a way of holding property and therefore there cannot be a trust without trust property. See the pointed criticism in J. N. Pomeroy, *The 'Civil Code' in California* (New York: N.Y. Bar Association, 1885), pp. 28–9.

An obligation ‘annexed to the ownership of property’ captures the idea that the beneficiary only ever has, in principle, a claim against the trustee; but that the debtor of that claim is not always the same person, and is rather the person who, from time to time, holds the ownership of the trust property. This old idea, now renewed, takes the focus away from division of ownership and places it instead on Equity’s understanding of obligations, as capable of passing to others along with the property to which they are bound. This obligational understanding of the common law trust holds out the promise of new developments in comparative law.

The papers in this volume grew out of a series of Civil Law Workshops held by the Quebec Research Centre of Private and Comparative Law during 2008–2009. The Centre has a long tradition of exploring fundamental issues in the evolution of the civil law through these workshops. The series on Trusts in Civil Law welcomed speakers from all over the world, who reflected on a wide range of difficult questions surrounding trusts in civilian and mixed legal systems. François Barrière, a leading commentator on the French *fiducie*, provided his analysis of how this extraordinary development came about, and why it took the shape that it did. In his workshop, Michael McAuley reflected on how Louisiana’s Trust Code interacts with the general law of property in that civilian state; his insights have important implications for every civilian system. The third workshop dealt with a phenomenon that will perhaps be increasingly important in the coming years: the creation of a trust in one jurisdiction that is governed by the law of another. Michele Graziadei discussed the Italian experience in this connection, and his important text forms part

of this collection; Jeffrey Talpis discussed a similar experience, albeit on a smaller scale, in Quebec.⁴ In the fourth workshop, Adam Hofri-Winogradow recounted the striking story of the diversity of trusts in what is now Israel, from the nineteenth century to today. Madeleine Cantin Cumyn addressed some of the reasons that lie behind the range of approaches that different jurisdictions have taken to the reception of the trust. In the final workshop of the series, Lusina Ho provided a careful conceptual analysis of the background and the nature of the relatively new Chinese trust.

Many people contributed to the realization of this project. The planning of the Civil Law Workshops for 2008–2009 began the year before, and was shared by Alexandra Popovici, Assistant Director of the Quebec Research Centre of Private and Comparative Law. Her successor, Véronique Fortin, helped to run the workshops, and both of them were instrumental in the further development of the Centre's research project in trusts, which led to a very successful international conference during September 2010 under the title *The Worlds of the Trust/La fiducie dans tous ses États*. Manon Berthiaume, the administrative assistant of the Centre, always ensures the smooth operation of everything that takes place here. Edmund Coates, researcher at the Centre, translated the texts of Madeleine Cantin Cumyn and François Barrière into English, a demanding task executed with his

⁴ J. Talpis, 'On the Right Track: Quebec Courts Recognize the Common Law Declaration of Trust' (2007) 27 Est. Tr. & Pensions J. 78, discussing a Quebec court's recognition of a declaration of trust made in California and governed by California law, where the trust included immovable property in Quebec.

usual flair. Natalie Dudyk prepared the texts for publication. I thank all of them, and of course I thank the speakers in the series who contributed so much energy and so many ideas. I also note with gratitude that the speakers whose texts are published in this volume agreed unanimously that the royalties should be devoted to the research projects of the Centre. I thank also Finola O'Sullivan of Cambridge University Press for her support of this project. I acknowledge with gratitude the financial support of the Social Sciences and Humanities Research Council of Canada, through its Standard Research Grants programme, and of McGill University through the James McGill Chair. I also acknowledge, for their substantial funding of the Centre's research into trusts in civil law and mixed legal systems, the financial support of the Fonds de recherche du Québec – Société et culture, and of Quebec's Ministère du développement économique, de l'innovation et de l'exportation.

After this volume was submitted to the press, the Quebec Research Centre of Private and Comparative Law lost its Founding Director, Professor Paul-André Crépeau, who passed away on 6 July 2011. He was a leader in all aspects of the academic branch of the law, in Quebec and around the world, and he is and will be sorely missed and fondly remembered. I am very pleased that by the time this book appears in print, the centre will have been renamed the Paul-André Crépeau Centre for Private and Comparative Law/Le Centre Paul-André Crépeau de droit privé et comparé.

Reflections regarding the diversity of ways in which the trust has been received or adapted in civil law countries

Madeleine Cantin Cumyn*

... in seeking guidance from comparative law materials the court must always be alive to structural difference between legal systems.¹

I. Introduction

The integration of the *fiducie* within the civil law of Quebec, as an institution analogous to the trust, is a process which cannot be said to have been entirely completed more than a century after it was first undertaken.² The *fiducie* is not yet seen to be truly part of Quebec's general law in the

* The present text is based on a presentation given on 6 March 2009 at the Faculty, as part of the workshops on trusts in civil law presided over by Prof. Lionel Smith. The author wishes to thank Mr Edmund Coates for rendering into English the original presentation.

¹ Lord Steyn, 'The Challenge of Comparative Law' (2006) 8 *European Journal of Law Reform* 3, 7 (Keynote address at the XVIIth IACL Congress in Utrecht).

² When using the English language, civilian legislation and doctrinal writers often use the term 'trust' for these institutions within their law (e.g. the Civil Code of Québec (C.C.Q.) and its predecessor the Civil Code of Lower Canada (C.C.L.C.)). However, the present text employs the term 'trust' for the common law's institution of the trust, and the

same way as its traditional institutions, such as partnership or mandate. The assimilation into Quebec's legal culture of this institution, which stands as a beacon of English law, has raised the conjoined questions of its appropriateness and of the legal categories which are brought into play. These issues have also been regularly debated in Europe throughout the twentieth century, but even more urgently since the conclusion of the Convention on the Law Applicable to Trusts and on their Recognition.³ Quebec's first law with respect to *fiducie*, enacted in 1879,⁴ gave rise to a controversial conceptualization of this technique, which needed the intervention of the legislator to be set aside, with the enactment of the Civil Code of Québec (C.C.Q.).⁵ The current provisions reject the analysis of the *fiducie* as a transfer of property to the trustee, an analysis from which it had been concluded that the trustee becomes the owner, an ownership dubbed *sui generis* since it is inherently bound in with obligations. Under the Civil Code of Québec, a

French term *fiducie* for the transplants, adaptations and analogues of the trust within civil law jurisdictions.

³ Hague Convention on the Law Applicable to Trusts and on Their Recognition, The Hague, 1 July 1985, in force 1 July 1992.

⁴ Act respecting Trusts, S.Q. 1879, c. 29, the provisions of which would become, on the occasion of the compilation of the revised statutes of 1888, articles 981a to 981n of the C.C.L.C. These provisions were supplemented by articles 981o to 981v C.C.L.C. enacted by the Act defining the Investments to be made by Administrators, S.Q. 1879, c. 30, setting out the requirements that the administrator of property belonging to another was, in principle, bound to comply with as to investments. These provisions applied, in particular, to a trustee, unless the act by which the *fiducie* was constituted exempted him from these requirements.

⁵ This Code has been in force since 1 January 1994.

fiducie involves the constitution of a patrimony by appropriation (*patrimoine d'affectation*), that is to say a patrimony dedicated to a purpose, and the trustee is characterized as an administrator of the property of another person.⁶ The legal regime for 'administration of the property of others', codified in a separate title of the Code from that of the regime for the *fiducie*, governs the conduct of the trustee, as it does that of any other administrator, as well as allowing the explanation, in terms of legal powers, of the prerogatives that the trustee exercises with respect to the property which comes within the *fiducie*.⁷

As several Continental European countries are presently undertaking an analogous process of reception with

⁶ The new regime governing the *fiducie* results from article 2, and articles 1256 to 1298 of the C.C.Q. The author analyses its principal elements in the following publications: M. Cantin Cumyn, 'La fiducie, un nouveau sujet de droit?', in J. Beaulne (ed.), *Mélanges Ernest Caparros* (Montreal: Wilson & Lafleur, 2002), p. 129, nos. 7–9; Cantin Cumyn, 'L'acte constitutif d'une fiducie', in B. Moore (ed.), *Mélanges Jean Pineau* (Montreal: Thémis, 2003), p. 650; Cantin Cumyn, 'Pourquoi définir la fiducie comme un patrimoine d'affectation?', in Quebec Research Centre of Private and Comparative Law, *Thirtieth Anniversary Conference 1975–2005 Cross-examining Private Law* (Cowansville: Yvon Blais, 2008), p. 131; Cantin Cumyn, 'The Quebec Trust: A Civilian Institution with English Law Roots', in J. M. Milo and J. M. Smits (eds.), *Trusts in Mixed Legal Systems* (Nijmegen: Ars Aequi Libri, 2001), p. 73; Cantin Cumyn, 'The Trust in a Civilian Context: The Quebec Case' (1994) 3 *Journal of International Trust and Corporate Planning* 69. For another point of view, see J. Beaulne, *Droit des fiducies*, 2nd edn (Montreal: Wilson & Lafleur, 2005).

⁷ C.C.Q. above, note 5, articles 1299–1370. This part of the Code is the subject of a treatise: M. Cantin Cumyn, *Traité de droit civil: L'administration du bien d'autrui* (Montreal: Yvon Blais, 2000).

respect to the trust, it would be natural to see as relevant the experience that has accumulated, and the solutions implemented, in Quebec law. Still, Quebec's take on the *fiducie* does not seem to have much drawing power in Europe.⁸ Granted, it is tempting to attribute the lukewarm interest in our *fiducie* to the choice made to define it as a patrimony by appropriation without the status of a juridical person. But it is doubtful that the elimination of the irritant produced by the Quebec legislator's choice of this characterization would automatically yield greater interest in the Quebec model for the *fiducie*, given the substantially different context around the reception of trust-type mechanisms in Europe. To understand the reaction of European jurists with respect to our *fiducie*, it is important to take into consideration the circumstances in which it occurs.

The idea that each country has of the *fiducie* or of the trust is shaped by more or less contingent internal factors. These factors just as much tend to determine the functions that the *fiducie*, whether or not derived from the trust, is called upon to fulfil, as they tend to determine the choice of the legal technique which can be used to put those functions into practice. In both respects, Quebec law as to the *fiducie* has developed along a path which departs markedly from the one which European countries have taken. We will seek to explain

⁸ With the exception, it would seem, of the Draft Code of the Czech Republic: see T. Richter, 'National Reporter for the Czech Republic', in S. Kortmann and D. Faber (eds.), *Towards an EU Directive on Protected Funds* (Law of Business and Finance Series) (Deventer: Kluwer Legal Publishers, 2009), vol. X, p. 59.

this departure in approach, by considering the reasons which press a few civil law countries into receiving a trust-type mechanism, namely why a *fiducie*? (section II below); and the legal category within which it will be brought into being, namely what sort of *fiducie*? (section III below).

II. The factors which favour the engrafting of the trust or the admission of the *fiducie*

It is hardly necessary to emphasize the importance of the trust within the common law tradition. The historical development of English law made the trust inescapable: it was the most significant outcome of the distinction between the jurisdiction of Law and that of Equity. The fusion of these two legal orders in the nineteenth century⁹ hardly reduced the structural role of this division. The legal technique of the trust is omnipresent: in particular, it is prominent in the distinction between legal and equitable title (as well as the remedies respectively tied to each type of title), in the standard of conduct established by the obligations of a fiduciary, and in cases where the courts impress a constructive or resulting trust to remedy a situation which is found to be unjust.¹⁰ Even if the

⁹ The fusion in England of the courts of common law with those of equity resulted from the Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66 (UK). There was similar legislation throughout the common law world.

¹⁰ To gain an awareness of the extent of the field in which the trust is applied, it is worth referring to D. W. M. Waters, M. R. Gillen and L. D. Smith, *Waters' Law of Trusts in Canada*, 3rd edn (Toronto: Thomson/Carswell, 2005). See also P. Lepaulle, *Traité théorique et*